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In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 698.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 38
and
ELECTRICAL JOINT APPRENTICESHIP AND TRAINING COMMITTEE,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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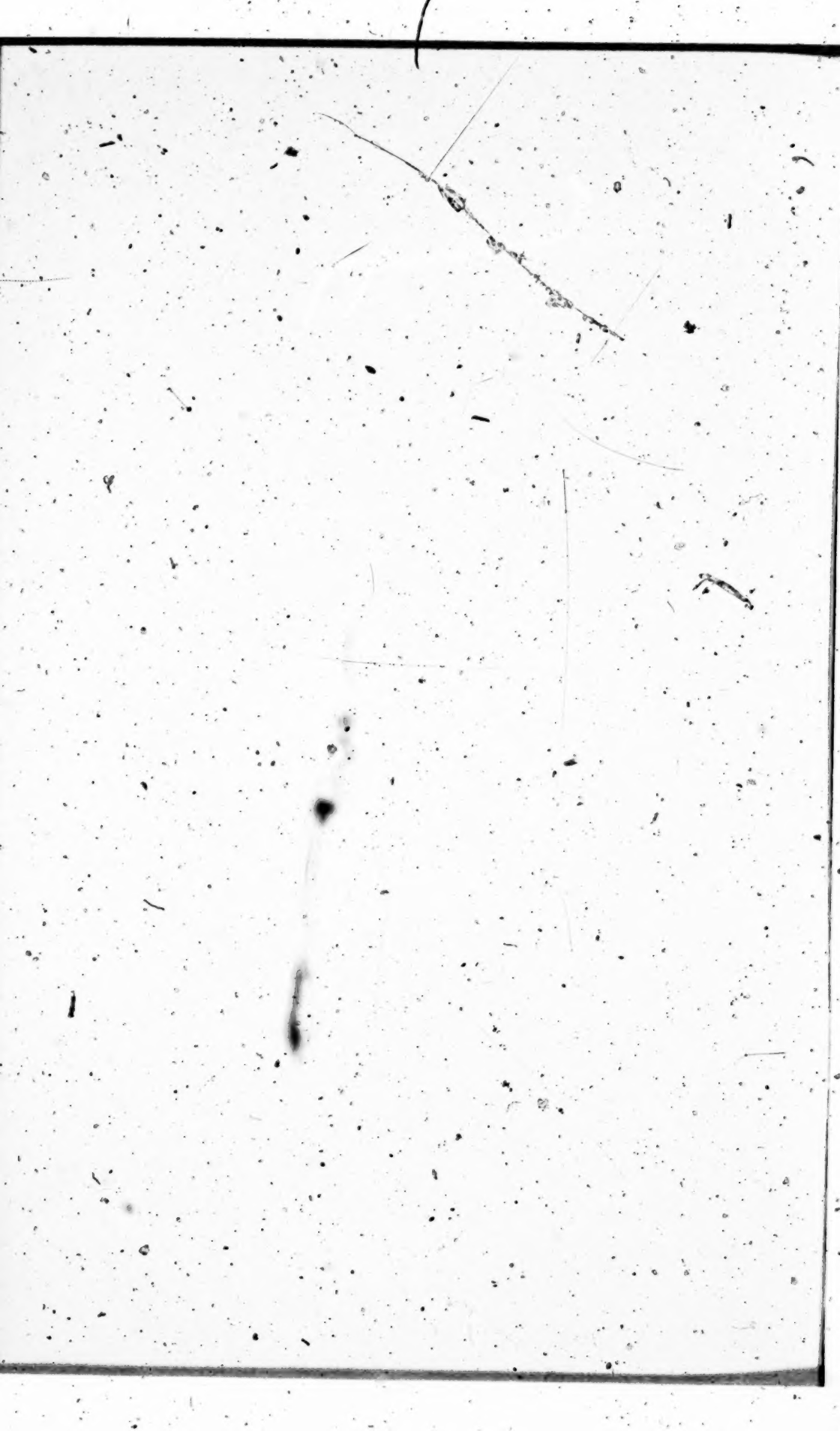

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals For the Sixth Circuit.

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in this proceeding on June 19, 1970.

OPINIONS BELOW.

The opinion of the Court of Appeals is not yet reported.

The opinion of the District Court for the Northern District of Ohio, Eastern Division, entered March 21, 1969, and the supplemental decision of the District Court entered as of the same date are not printed in the federal reporter; the former is printed in 70 LRRM 3019; all three opinions with the order of the Court of Appeals are printed in the Appendix hereto.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 19, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED.

Whether in a Title VII proceeding a Court of Appeals may reverse the District Court's judgment without any showing that its findings of fact were "clearly erroneous" and may vacate the District Court's decree without any showing that it constituted an "abuse of discretion" and remand "for consideration of appropriate affirmative relief," when such consideration has been given by the District Court and such affirmative relief found unnecessary.

STATUTES INVOLVED.

The pertinent provisions of Title VII, Civil Rights Act of 1964, 78 Stat. 241, 42 U.S.C. Sec. 2000(e)-2000(e)15 are set forth in the Appendix.

STATEMENT OF THE CASE.

The Court of Appeals accepted *en toto* the issues as framed by the Department of Justice as follows (App. 82).

"Appellee took no cross appeal and appellant presents only two issues:

> "(1) Whether the district court erred in ruling that, despite their traditional practices of denying membership and referral to Negroes because of their race, defendants may now follow referral and admissions practices which, although racially neutral on their face, perpetuate the effects of past discrimination and result in the present and future denial of employment opportunities to Negroes which are equal to their similarly qualified white contemporaries.

"(2) Whether having found that defendants engaged in unlawful racially discriminatory employment practices up to the eve of this lawsuit, the district court erred in failing to grant any specific relief, and in refusing to retain jurisdiction and to require the submission of reports and maintenance of records to insure compliance with the law.

"We answer both of these questions in the affirmative."

By accepting the statement of (1) above as a *fact*, the Court of Appeals overruled the District Court's studied and detailed findings of fact that the petitioners (then defendants) referral and admission practices did *not* perpetuate the effects of past discrimination and did *not* result in denial of employment opportunities.[1] And the Court of Appeals did this without any showing that the District Court's findings of fact were clearly erroneous.

By answering (2) above in the affirmative, the Court of Appeals made no attempt to show the denial of specific

---

[1] The District Court's specific findings were (App. 41):

"Taking all the post-Act evidence into consideration, the Court is of the opinion that the plaintiff's proposal regarding waiver of the collective bargaining agreement's experience requirements goes far beyond the limits that are necessary to alleviate the effects of past discrimination. The legal predicate for that proposal by the Government is that a referral program, which, though neutral on its face, continues the effects of prior discrimination must be considered as presently discriminatory. *Dobbins vs. Local 212, supra.*

"The deficiency in that proposition is that it is not relevant to the record in this case. The effects of past discrimination has rather effectively been dissipated by the policies of the present union leadership. Each of the Negroes who were the subject of discrimination has advanced within the referral system to the point where the effects of the prior practice no longer affects his employment opportunities. As to other Negro electricians as to whom specific discrimination has not been shown, the union's present referral policies, coupled with actual economic conditions in the home building industry, make priority within the referral system an abstract consideration in relation to an individual's ability to obtain employment."

relief was an abuse of discretion, while the District Court did retain jurisdiction specifically in part and wholly through equity's general powers. Further, the Court of Appeals remanded "'for consideration of appropriate affirmative relief.'" This consideration had been given as shown by the District Court's extensive findings of fact, and that its judgment was based in a large part on its findings of credibility of the union officials who eliminated all discriminatory practices and which credibility and good faith findings the Court of Appeals upheld![2]

The complaint in the District Court alleged discrimination in violation of the Act in four areas: (1) that Local 38 refused to admit Negroes to membership in the union; (2) that Local 38 refused to consider Negroes for employment through the referral system on the same basis as white applicants; (3) that Local 38 refused to enter into a collective bargaining agreement with Negro electrical contractors on the same terms and conditions offered to white electrical contractors; and (4) that as to the defendant, Electrical Joint Apprenticeship Committee (EJAC), which is composed of an equal number of persons appointed by Local 38 and by NECA, the National Electrical Contractors Association, the bargaining agency representing electrical contractors in the Cleveland area, the allegations were that it has pursued a policy and practice of discrimination against Negro applicants to enter into the apprenticeship program because of race.

We will discuss these in order.

(1) **Journeyman membership.** The District Court found that Local 38 had refused to accept anyone, white or black, into direct membership as distinguished from

---

[2] The Court of Appeals said (App. 88): "Assuming, as the District Judge plainly did, and *as we do*, that the new leadership is in utter good faith, * * *." (Emphasis added.)

membership through the apprenticeship system, since 1952, except for three Negroes who were granted direct membership in 1957. Therefore, the Court felt that there was no discrimination against Negroes in refusing them direct membership while all whites were being similarly refused membership.

Since, however, both Group I in the referral system and membership in the union required passing an "IBEW Journeyman Wireman's Examination" and since the court found that there had not been any such examinations given, except once to some sixteen whites in 1959, all of whom flunked, it held (App. 25):

> "While the fact that there has been no such test for several years is true, the failure to administer such a test cannot be considered discriminatory. It was not until the summer of 1967 that any substantial numbers of Negroes began to work under the jurisdiction of Local 38 through the referral system. The record reflects that at that time Mr. Richard Acton, the newly elected Business Manager of Local 38, had discussions with Mr. Richardson, and also with individual Negroes applying for work indicating to them that there was the possibility of achieving union membership through the referral system. Mr. Acton further testified that he also discussed with Local 38's newly elected president, Mr. John G. Steele, the giving of the required test, and they determined to do so at a time when there were enough Negroes qualified to take the test under the existing standards, so as to make it meaningful as a practical matter. Thereafter the union leadership became so tied up in this litigation that they were unable to implement their determination to proceed with such a test. When the government became apprised of the fact that Local 38 intended to proceed with the test after this trial had been concluded, a motion was filed by the plaintiff [United States] to restrain the union

from going forward, which motion was granted with leave to the union to reapply to the Court for permission to give the test. Such a request is now pending before the Court.

"It would thus appear that the initial failure to administer the test for Group One status subsequent to July 2, 1965, could not have affected the employment opportunities of Negroes, and that the fact that the test has not yet been given is not racially motivated. While the fact that there were not sufficient Negroes working under the auspices of Local 38 to make the granting of the examination meaningful may itself involve racial discrimination, that is not the question here under consideration, and it will be dealt with in considering the referral system.

"It is, therefore, this Court's conclusion that the plaintiff has failed to prove a pattern and practice of racial discrimination on the part of Local 38 by its refusal to directly admit Negroes to journeyman membership, or its failure to date to administer the test for Group One which will open the door for an application to journeyman membership.

"Were it not for the fact that the defendant union is pressing to go forward with its Group One test, the Court would issue an order requiring it to do so, for a continuing failure to administer such test would constitute a discriminatory practice remedial under Title VII. At this juncture, no such order is necessary.

"In its proposals for relief under the heading of journeyman membership, the plaintiff suggested certain variations in the collective bargaining procedures relative to the Group One test, and the right of persons passing the exam to apply for journeyman membership in Local 38. Such alternative procedures constituted the entire relief sought by plaintiff in this area. The defendant Local 38, relative to the giving of the journeyman wireman's examination, and the government's proposals as to the appropriate conditions to be applied thereto, will be considered and resolved within the framework of that motion."

Thereafter, a hearing was held and a supplemental decision was written by the Court, in which it held as follows (App. 72):

> "Turning now to the Government's proposal pertinent to this matter, the Government in essence suggests a waiver of the experience under the collective bargaining agreement as a prerequisite for eligibility to take the examination, and that Negroes who pass the examination be admitted to union membership based thereon without the necessity of a vote of the membership.
>
> "As to the waiver of eligibilities requirement, the proof established that all Negroes who were the subject of specific discrimination regarding referral are now eligible to take the examination. There are in addition a substantial number of other Negroes presently eligible to take the examination who were not shown to have been discriminated against.
>
> "As to the direct admission to membership, the Court has previously found that plaintiff has failed to prove that the defendant has utilized general membership votes as a discriminatory device.
>
> "Based on the Court's findings on the merits herein, the Court does not believe that the action requested by the Government is either necessary or warranted. If it should hereafter develop that there appears to be a pattern or practice of discrimination with regard to admission of membership as applied to persons placed in Group I, that problem can be dealt with when it arises, and should not be anticipated at this time."

The District Court has thus specifically retained jurisdiction over the case in regard to membership.

The Court of Appeals did not rule that the District Court's finding in regard to membership was clearly erroneous, and the District Court's opinion as to the future has been sustained because all five blacks who have passed the

Group I test since the decree have been voted into membership in Local 38.

(2) **The referral procedure.** Local 38 has had in its collective bargaining agreement with contractors since 1958, a referral procedure whereby each electrical contractor notifies the union of his employment needs, and is referred electricians. The District Court explained (App. 27):

> "In order to become a part of the referral system an electrician must appear in person at the union hall to fill out a referral application showing his job qualifications. The referral system is divided into four priority groups, and the applicant is classified into one of the groups, according to his qualifications. Under the collective bargaining agreement, Local 38 is to maintain an out-of-work list of all referral applicants for whom work is not available and when there is a job available the men are to be referred from such list by group priority, or by date of application within groups. However, an applicant for referral must reconfirm his availability for employment after sixty days in order to retain his priority.
>
> "Prior to May 1, 1968, the requirements for placement in the four referral groups were as follows:
>
> Group I. Four years experience in the trade; pass an IBEW journeyman wireman's exam; one year's residence within the jurisdiction of Local 38; and four years experience under the collective bargaining agreement.
>
> Group II. Four years experience in the trade; pass an IBEW journeyman wireman's exam.
>
> Group III. Four years experience in the trade; one year's residence within the jurisdiction of Local 38; four years experience under the collective bargaining agreement.
>
> Group IV. Two years experience in the trade."

The Court went on to find that on May 1, 1968, Local 38 revised the standards for Groups I, III, and IV so as to broaden them. For Group I, the work experience requirement remained at four years, but only one year under the collective bargaining agreement was required. For Group III, the work experience requirement was reduced to two years in the trade and six months in the last three years under the agreement. Group IV was revised to require only one year's experience in the trade.

The Court found evidence of three individuals who were discriminated against through the referral system. Two of these occurred just a month before the new administration came into office, when two Negroes were told to come back in a couple of weeks instead of being referred to work. They came back and were immediately referred to work by the new officers. Another man had been denied referral before that by the prior administration, and he was also referred to work by the new administration. The Court said (App. 30):

> "There is evidence in the record to indicate that Local 38 had engaged in discrimination in the administration of the referral system. The record further indicates, however, that any discriminatory practices which existed in this area came to a complete stop as of July, 1967. At that time new leadership came into control of Local 38 as the result of an election held in June, 1967. The two principal officials who assumed office were Richard Acton as Business Manager and John Gilbert Steele as President. Mr. Acton replaced all the incumbent business agents who work in the administration of the referral system with his own appointees.
>
> "Plaintiff has alleged in its Brief and has suggested throughout the Government's presentation that any change in policy by the defendant union is a direct

outgrowth of the pendency of this litigation. The Government has noted that Mr. Acton and Mr. Steele, along with other persons who ran for union offices with them on various slates, had previously held union positions. The record these men had in the union's elected bodies was not such that would enable them to have a strong hand in formulating union policy. The Court was able to observe Mr. Acton and Mr. Steele as witnesses in this trial and evaluate their credibility. It is the Court's conclusion that their positive actions in moving this union forward in the field of racial integration reflect their own personal convictions, and do not represent matters of expediency to develop a record for the courts. While it may be true that the Government's investigation of Local 38 was a motivating force, and the filing of this action coming as it did virtually on the eve of their election brought home to the new officers the full realization of the depth of the problem confronting the union; that does not require the conclusion that the officers' response thereto was not in good faith."

The Court of Appeals without any showing that the finding was clearly erroneous differed with it and made its own findings based on mistakes and its own conclusions (App. 87) as our editorial inserts in brackets show:

"It is important, however, to note that the record of this case shows two years of discriminatory practices after the effective date of the Act."

[But the "2 years of discriminatory practices" were two instances of failure to refer by the defeated officers and one prior instance by the same officers and the new officers immediately referred all three to work.]

"As of the date of the complaint [1967] in this case, defendant union had 1,318 members, of whom two were Negroes: On that date it had 255 apprentices, of whom three were Negroes. And in the preceding year it had referred 3,487 persons for work in

the electrical trades through its hiring hall, of whom only two were Negroes."

|If statistics like these are decisive, the Department of Justice should be enjoined; in 1967 it was one of the worst discriminators in the government.[*]|

"The District Judge found that the evidence supported the government's claims of discriminatory practices extending up to and beyond the date of the filing of this complaint."

|The Court of Appeals is mistaken. The Complaint was issued August 8, 1967. The District Court found (App. 30): "The record further indicates, however, that any discriminatory practices which existed in this area (referral) came to a complete stop as of July, 1967. At that time new leadership came into control of Local 38 * * *"|

"While he limited specific findings of discrimination to the union's referral practices, these practices controlled absolutely who got jobs in the organized electrical trades in the Cleveland area. The record discloses that 75% of all electrical construction work in the Cleveland area was done under Local 38's contract."

|This is true but the three blacks discriminated against were referred to employment immediately by the new officers.|

"These facts (and the above-stated difference of interpretation of 2000(e)-2(j)) require vacation of the pro forma judgment entered by the District Judge and remand for consideration of appropriate affirmative relief."

"These facts" were far short of a showing of "clearly erroneous." This Court has held that a finding cannot be

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[*] In the Department of Justice in 1967 only 7.6% employees were black and these were congregated in G.S. 1 through 4, practically menial labor, while only 9/10 of one percent were in G.S. 12-18 the medium to high paid positions. (From the "Study of Minority Group Employment in the Federal Government, 1967" prepared by U.S. Civil Service Commission.)

set aside as "clearly erroneous merely because the appellate court might give the facts another construction, resolve the ambiguities differently and even find a more sinister cast to actions which the District Court deemed innocent," *U. S. v. National Association of Real Estate Boards,* 339 U.S. 485, and where evidence would support a conclusion either way, but where a trial court has decided to weigh it more heavily for defendants, such a choice between two permissible views of the weight of the evidence is not "clearly erroneous," *U. S. v. Yellow Cab Co.*, 338 U.S. 338.

Further the Court of Appeals remand for the District Court's "consideration of appropriate affirmative relief" is not a finding that the trial court had abused its discretion in formulating the relief and overlooks the real consideration the trial court had given affirmative relief as to referral procedure wherein discrimination had been found. The District Court found (App. 41):

> "At the present time there are over forty Negro electricians working on referral groups from Local 38. Approximately one-third of that group, including every individual as to whom post-Act discrimination was shown has been working under the referral system for a sufficient length of time to qualify for the proposed Group I journeyman wireman's exam."
>
> "Taking all the post-Act evidence into consideration, the Court is of the opinion that the plaintiff's proposal regarding waiver of the collective bargaining agreement's experience requirements goes far beyond the limits that are necessary to alleviate the effects of past discrimination. The legal predicate for that proposal by the Government is that a referral program, which, though neutral on its face, continues the effects of prior discrimination must be considered as presently discriminatory. *Dobbins vs. Local 212, supra.*"

"The deficiency in that proposition is that it is not relevant to the record in this case. The effects of past discrimination has rather effectively been dissipated by the policies of the present union leadership. Each of the Negroes who were the subject of discrimination has advanced within the referral system to the point where the effects of the prior practice no longer affects his employment opportunities. As to other Negro electricians as to whom specific discrimination has not been shown, the union's present referral policies, coupled with actual economic conditions in the home building industry, make priority within the referral system an abstract consideration in relation to an individual's ability to obtain employment."

"Finally, while admitting that Local 38 has since July, 1967, referred a number of Negroes for employment, the Government contends that the union continues to follow policies which, although not discriminatory on their face, result in discrimination against Negroes because it perpetuates the effects of previous exclusion of Negroes. The evidence on this record supports the finding that since July, 1967, when the new union leadership took office, there has not been a single instance of true intentional discrimination in the administration of the referral system. Mr. Acton testified that he has referred every qualified Negro electrician who applied for work. And the evidence has produced no evidence to rebut that testimony. There is other evidence in the record that the present union leadership has actively participated in programs to further integration of the craft unions, and to stimulate minority group interest in the electrical trade."

The District Court went on to find that the Associate Director of Community Relations of Case Western Reserve University in Cleveland, himself a Negro, testified how Local 38 had in the past been a "problem" union in racial relations, but no longer has such a reputation (App. 40).

The Court then found (App. 41):

"It appears to the Court that the only way in which the defendant union could improve its specific record with regard to Negro referral would be to solicit Negro electricians for employment, which the Civil Rights Act does not require or grant preferential treatment to Negro referral applicants, which the Civil Rights Act does not permit."

The Court further considered specific affirmative relief and ruled (App. 43):

"In conjunction with its proposal that certain of the collective bargaining conditions for referral be waived as to Negroes, the Government seeks an order that Local 38 shall establish formal procedures for the referral of persons with less than one year of electrical experience, and until such time as such procedures are formalized, Negro applicants of less than one year's experience as an electrician and who are over the apprenticeship age shall be referred in Group IV. This Court should not require the union to establish a referral classification not provided for by the collective bargaining agreement unless the record indicates that such action is necessary to overcome the effects of past discrimination. As the temporary 2-B classification which category was similar to the Group proposed by the Government was discontinued prior to July 2, 1965, this Court cannot grant any relief based on its former existence. While there is evidence that some whites without the requisite experience for referral were given employment after July 2, 1965, such practice was stopped by the present leadership. And the number of such referrals in relation to the total referrals during the relevant period is small. The Court does not believe that the potential discriminatory impact of that discontinued practice is significant or meaningful to warrant the far-reaching relief proposed by plaintiff. It appears to the Court that to grant the relief permitting referral of only

Negroes with no electrical experience would be to create a favored class in order to correct an existing imbalance, which is prohibited by 42 U.S.C. Section 2000(e)-2(j).

"The plaintiff has made other proposals regarding the relief herein. Certain of those are directed to a requirement that Local 38 strictly observe the collective bargaining agreement's conditions as to record keeping. There is no question that the union should comply with such requirements. Certain other proposals, however, would in effect make the United States the general supervisor of the collective bargaining process through which the referral program was formulated. The Court does not believe such an order is warranted in this case.

"It is the Court's conclusion that the only relief necessary at this time, based upon the entire record, is a general order enjoining the defendant union from discriminating in the operation of the referral system and requiring observance of the terms of the collective bargaining agreement of May 1, 1968."

Thus the District Court gave great consideration to affirmative relief *and granted it* to the extent in the best judgment of that Court it was necessary.

However, the Court of Appeals again differing with the District Court, but without a showing that it had abused its discretion in framing relief, held (App. 88):

"We do not, however, wish to ignore the other factor which played an important—perhaps decisive—role in the District Judge's decision concerning affirmative relief in this case.

"As we have indicated, after this suit was filed by the Attorney General, but before trial, a new administration was elected to office in Local 38. The District Judge found that the new officers favor voluntary compliance with the Civil Rights Act of 1964 and have taken steps to bring past discriminatory practices to an end. These facts, however, do not in our

opinion warrant the District Court's refusal to retain jurisdiction of this case or its refusal of affirmative relief. The record of compliance is very brief—particularly as compared to the long record of discrimination—and even that record has been written under the impact of this litigation. *Cypress v. Newport News Gen'l. & Nonsectarian Hosp. Ass'n.*, 375 F.2d 648 (4th Cir. 1967). Assuming as the District Judge plainly did, and as we do, that the new leadership is in utter good faith, it has no mean task ahead in eliminating ingrained discriminatory practices of past decades. In many respects a more specific court order, plus retention of jurisdiction, might serve to support the stated objectives of the new administration of Local 38. And, in any event, such relief is authorized by the Act and called for in this record. *United States v. Hayes Int'l Corp.*, 415 F.2d 1038 (5th Cir. 1969)."

The District Court has jurisdiction of this case as we show hereafter and it did consider and grant the relief it found needed. The Court of Appeals is merely differing in opinion—not finding an abuse of discretion.

(3) **Negro contractors.** The District Court held that the plaintiff had failed to prove any racial discrimination in Local 38's dealings with black contractors. (App. 22.) The Department of Justice made no complaint of this finding in its appeal to the Court of Appeals.

(4) **The apprenticeship program.** The Government alleged that there were specific cases of discrimination in the apprenticeship selection for the classes in the spring and fall of 1965 and 1966.[1]

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[1] The petitioner EJAC, incidentally, when it was advised by the Department of Justice of its allegations that thirteen persons were discriminated against in those selections, immediately offered all thirteen a position in the class of 1967. Three accepted, three were in the Armed Services, three declined, three failed to respond, and one could not be located (R. 760). One who declined the offer, in 1967, Tyrone Price, in 1970 came to EJAC and asked if he could now reconsider. He was advised he could and was admitted to the 1970 apprentice class.

However, when the Government presented evidence, it failed of proof; the Court's finding as to this alleged discrimination is as follows (App. 57):

> "Based on all the foregoing, it is the court's conclusion that the plaintiff has failed to carry the burden of proving that Local 38 EJAC engaged in an intentional pattern and practice of discrimination by the administration of the apprenticeship selection procedure in 1965 and 1966. The evidence raises some doubt and suspicions in that direction, but there are simply too many holes in the evidence for the Court to find other than that the plaintiff has established the possibility that Negroes were the subject of discrimination. It is the court's opinion that the Civil Rights Act requires a stronger showing than that before the Court may find that the plaintiff has proved its case."

The Court then found that the new leadership of Local 38 in 1967 adopted the so-called national plan (App. 57-58) which had been developed by the IBEW on a national basis, and which had been determined to be consistent with 29 CFR Part 30 by the Department of Labor. The Government claimed the plan was discriminatory, although it did not allege any specific cases of discrimination, but stated only that it was a non-objective and non-reviewable way of selection. Local 38, on the other hand, claimed that it was reviewable and demonstrated through defendant's Exhibit AAA (App. 91) as explained by its expert (R. 574-628), a way of testing the reviewability and showing whether or not each examiner was doing a non-discriminatory job. This exhibit is reproduced in the appendix without various charts and tables which were the work product of the expert.

The Court, after reviewing the evidence in detail held as follows (App. 62):

"There is no doubt that the national plan under which the EJAC is now operating has a substantial subjective element in it, and as such the label of 'discretionary' attached to it by the plaintiff is not totally unreasonable. To say, however, that a test is discretionary does not automatically mean it is discriminatory. A degree of discretion is not, in and of itself a vice. It is the manner in which that discretion is exercised that is critical.

"There is testimony in this record by witnesses conversant with the problem that Negro youths in this geographic area as a group are among those persons referred to by sociologists as culturally deprived, although they do not constitute the entirety of that segment of the populace and can not be so categorized. As such, they are at a general disadvantage competing with suburban white youths on the basis of education and background. A testing procedure with a discretionary element can be used to penalize the culturally deprived for deficiencies which society has created, and thus further restrict their opportunities to join the mainstream of modern life. On the other hand, if such discretion is wisely exercised, one may acknowledge these realities of present urban conditions, and make allowances therefor, thereby narrowing the built-in differential between individuals coming from unequal environments. On this record there is no evidence that the Local 38 EJAC has taken advantage of the discretionary aspects of the national plan to practice racial discrimination."

The Court then concluded:

"In summary, the plaintiff has shown a generally discriminatory approach to apprenticeship by EJAC prior to July 2, 1965. Although the evidence for the years 1965 and 1966 would support a strong suspicion of racial discrimination, the plaintiff has failed to prove an actual pattern and practice of discrimination, continuing beyond July 2, 1965. Consequently,

the plaintiff is not entitled to a finding in its favor with a mandatory order directed to EJAC, on this subject matter."

The Court then went on, however, to make suggestions for improving the national plan, all of which, with one exception, recording the 30 or 40 sessions of the interviewing board, which was considered too cumbersome, were adopted by EJAC.

Despite all the above findings and the extensive supporting evidence, the Court of Appeals ignored them and said that it recognized that the District Judge "did not in theory reject all affirmative relief, he did reject it in this case." However, the District Court had issued its injunction as set forth above enjoining the union from discriminating in the operation and administration of the referral system and from denying equal employment opportunities to all persons with regard to the referral system, and also requiring strict adherence to the collective bargaining agreement provisions relating to the referral system. The order also provided retention of jurisdiction, over the motion regarding the journeymen wiremen's examination as shown above, and later the Court issued a supplementary decision in regard thereto. Actually the District Court, we believe has retained jurisdiction of the entire case, because any time either party could move to ask that the decree be changed or modified. As a matter of fact, the Department of Justice, in August, 1970, filed a request for production of documents under Rule 34 of Federal Rules of Civil Procedure, so the Attorney General presumes, as we do, that the court has retained jurisdiction of the case in all respects. This is in line with decisions of this Court. In *United States vs. United Shoe Machinery Corporation*, 391 U.S 244 (1968), it stated clearly and positively that a decree can always be

reopened. It pointed out that in the *United States vs. Swift & Company*, 286 U.S. 106, it had not limited the court below in granting relief long after the case apparently was closed and the court said that in *Swift*:

> "The lower court granted a measure of relief and the United States appealed. This Court reversed. It emphasized the power of a court of equity to modify an injunction in adaptation to changing conditions though it was entered by consent."

Then it went on to say:

> "*Swift* teaches that a decree may be changed upon an appropriate showing and it holds that it may NOT be changed in the interests of the defendants, if the purposes of the litigation as incorporated in the decree (the elimination of monopoly and restrictive practices), have not been fully achieved."

It held:

> "Decision as to the government's petition to modify the decree in the present case must be based upon the specific facts and circumstances that are presented."

Then the Court said:

> "The trial court is charged with inescapable responsibility to achieve this objective [to deny the fruits of statutory violations to defendants]. Although it may, if circumstances warrant, accept a formula for achieving the result by means less drastic than immediate dissolution or divestiture. The decree in the present case was carefully devised within the limits of this principle. Measures short of divestiture were prescribed with provisions for review and possible revision after ten years * * *. If the decree had not contained paragraph 18—if it had been silent as to the time for submitting reports and if necessary, petitions for modification—and if after ten years it

were shown that the decree had not achieved the adequate relief to which the Government is entitled in a Section 2 case, it would have been the duty of the court to modify the decree to assure complete extirpation of the illegal monopoly. The court's power to do this is clear * * *."

Unquestionably the district court has retained jurisdiction herein and yet one of the reasons stated by the Court of Appeals for overturning the district court's decree was that it had not retained jurisdiction.

The Court of Appeals did not rule that any of the above findings of the district court were clearly erroneous or that the district court abused its discretion in framing the injunction. It merely disagreed with the reasoning of the district court and held that affirmative relief is mandatory regardless of the district court's findings of fact and rulings on credibility and findings of a good faith break from the past by Local 38's new officers.

REASONS FOR GRANTING THE WRIT.

I. An Important Question of Federal Law.

The decision below presents an important question of federal law, which has not been and should be settled by this Court. Unless Title VII, without any such provision within it, is to be considered beyond the "clearly erroneous" rule and to take away from district courts their discretion in formulating decrees based on their findings of fact, then petitioners urge review, independently of whether or not we prevail on the merits, as vital to the effective utilization of Title VII under the circumstances relating to the power of district courts in these cases.

Rule 52 of the *Rules of Civil Procedure* provides:

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given the oppor-

tunity of the trial court to judge the credibility of the witnesses."

A decision made rule, just as specific, is that a wide range of discretion rests in the district court in framing relief in a decree, and abuse of discretion must be found for an appellate court to set aside such decree.

The Court of Appeals in this decision ignored both of these applicable rules.

II. In Conflict with the Decision of Another Court of Appeals.

The decision is in direct conflict with a decision of the Fifth Circuit Court of Appeals in *U. S. vs. Atkins*, 323 F.2d 733 (1963) decided under the Civil Rights Act of 1960. There an action had been brought by the United States under an earlier Civil Rights Act, 42 U.S.C. 1971, against a State and a County Board of Registrars in regard to alleged racially discriminatory acts and practices in registration of voters. The District Court denied the requested injunctive relief but issued an injunction compelling the Board to allow rejected applicants to apply for re-registration. The United States appealed. The Court of Appeals held that notwithstanding that findings to the effect that current Board of Registrars had not engaged in racially discriminatory practices in registering voters were not clearly erroneous, it was an abuse of discretion to refuse an injunction enjoining members of Board of Registrars and their successors from engaging in any acts or practice intended to result, or the probable effect of which would be to result, in racial discrimination in registration of voters, where circumstances required the conclusion that there was a cognizable danger that there would be some discrimination without injunctive relief.

The Court of Appeals said as to "clearly erroneous:"

"The district court found as a fact that the present Board of Registrars has not engaged in racially discriminatory acts and practices, has not pursued a full-time pattern or practice of discrimination, and has not been more stringent in its requirements to Negroes than to whites. The court found that the present Board 'has made every effort to comply with the letter and the spirit of the law, and has taken the necessary steps to eliminate the discrimination which was the basis of the suit against its predecessor Board.' The United States attacks this finding and asserts that the new practices are applied so as to be merely a more sophisticated form of discrimination than that practiced in the past.

This Court may not set aside findings of fact of the district court unless they are 'clearly erroneous.' Fed. R. Civ. P. 52(a). A study of the evidence in this case does not convince us that the district court was clearly in error in finding that the present Board is not engaged in racial discrimination."

And as to "abuse of discretion," the Court said:

"The real question, then, is whether it was an abuse of discretion by the trial court to refuse to grant the injunction. We believe that it was. In *United States v. W. T. Grant Co., supra,* the Court also held that along with a court's power to hear the case, the power to grant injunctive relief survives discontinuance of the illegal conduct, since the purpose of an injunction is to prevent future violations. But the moving party must satisfy the court that relief is needed. There must exist some cognizable danger of recurrent violation, more than a mere possibility; and a strong showing of abuse of discretion must be made to reverse the Chancellor's decision. The Court said the following factors should be considered: (1) the bona fides of the expressed intent to comply, (2) the

effectiveness of the discontinuance, and (3) in some cases, the character of the past violations."

The Court of Appeals then found that there was an abuse of discretion and that a general injunction against discrimination should have been ordered by the district court and the case was remanded.

Since *U. S. vs. Atkins,* the Fifth Circuit has consistently applied the two rules in civil rights cases, *U. S. vs. Edwards,* 333 F.2d 575 (1964); *U. S. vs. Ramsey,* 353 F.2d 650 (1965); *U. S. vs. Leflore County,* 371 F.2d 368 (1967).

The instant decision is in direct conflict with the Fifth Circuit decision.

III. In Conflict with Applicable Decisions of this Court in Analogous Situations.

In other civil rights cases the importance of the district court has been upheld by this Court. For instance in the landmark case of *Brown vs. Board of Education of Topeka,* 349 U.S. 753 (1955), this Court held further argument on the question of relief, and invited the parties and the Attorney General of the United States to participate in the argument. It then went on to hold that:

"Full implementation of these constitutional principles (in regard to desegrating schools) may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal."

Then it said:

> "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power."

In another civil rights case, *Green vs. County School Board of New Kent County, Virginia*, 291 U.S. 430 (1968), the Court more recently said:

> "The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state imposed segregation. It is incumbent upon the district court to weigh the claim in light of the facts at hand and in light of any alternatives that may be shown as feasible and more promising in their effectiveness. Where the court finds the board to be acting in good faith and the proposed plan to have real prospects for dismantling the state-imposed dual system 'at the earliest practicable date,' then the plan may be said to provide effective relief. Of course, the availability to the board of other, more promising courses of action may indicate a lack of good faith; and at the least it places a heavy burden upon the board to explain its preference for an apparently less effective method. Moreover, whatever plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation is completely removed."

Quite similar to civil rights and Title VII cases are antitrust cases, but despite direct appeal to the Supreme Court provided by that statute and the tremendous problems arising thereunder, there has been no erosion of the "clearly erroneous" statutory rule nor the "abuse of discretion" court made rule. For instance, in *Besser Manufacturing Company vs. United States*, 343 U.S. 444, this Court set forth that:

> "Appellants assert that the factual conclusions of the trial court are erroneous. Only recently we reiterated the narrow scope of review with respect to issues of fact in antitrust cases. *United States vs. Oregon State Medical Society*, 343 U.S. 326. In this case we think it enough to say that the conclusions of the trial judge that appellant conspired to restrain and monopolize interstate commerce in concrete block-making machinery and that they monopolized and attempted to monopolize that industry are overwhelmingly supported by the evidence. Not the slightest ground appears for concluding that the trial judge's findings were 'clearly erroneous.' Rule 52(a) Fed. Rules Civ. Proc. 28 U.S.C. 14."

This Court then said regarding affirmative relief:

> "In framing relief in antitrust cases, a range of discretion rests with the trial judge. * * * We can find no abuse of discretion here."

In *United States vs. E. I. DuPont DeNemours and Company*, 366 U.S. 316 (1961), also an antitrust suit, this Court said:

> "One principle has comprehensive application. It is that courts of equity as this Court advised the District Court in remanding the case to it to fashion the appropriate relief, 'are clothed with large discretion to model their judgment to fit the exigencies of the particular case.' 353 U.S. at pp. 607-608, 77 S. Ct.

at page 885. This is commonplace, but one of the compelling importance. To forget it is to forget equity's special function and historic significance. The transcendence of this doctrine derives from the recognition that without it the effort to dispense equal justice under law would all too often be frustrated. The landmark sentences of *Hecht Company vs. Bowles*, 321 U.S. 321, * * * express the principles that must guide the chancellor: 'we are dealing here with requirements of equity practice with a background of several hundred years of history. * * * The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for adjustment and reconciliation between the public interest and private needs as well as between conceding private claims. * * *"

This Court pointed out:

"The District Court was duty bound to exercise discretion—which means to weigh contending considerations and conflicting evidence as a matter of judgment—in framing a decree to meet the needs of the case. It could not escape exercising discretion—that is, exercising its judgment within an area of allowable choice—which this Court committed to it. Discretion precludes whimsy or caprice. Discretion means judicial discretion of a court of equity. When precedent or judicial tradition has established limitations on the chancellor's range of choice, he must respect them."

This Court further said:

"To tell a trial judge that he has discretion in certain matters is to tell him that there is a range of choices available to him. It is to tell him that the responsibility is his, and that he will not be reversed

except for straying outside the permissible range of choice, i.e., for abuse of discretion. * * * In sustaining the judgment *Lorain Journal Company vs. United States*, 342 U. S. 143, * * * the court stated its standard for upholding the trial court's decree as simply that 'the decree is reasonably consistent with the requirements of the case and remains within the control of the court below.' * * * Certainly we ought not to reverse the carefully wrought results of a conscientious trial judge without a showing amounting almost to a demonstration that he exceeded the fair limits of judicial choice which this Court explicitly reposed in him."

This Court has been just as zealous in regard to the two rules when the district court had dismissed the case before it.

In *United States vs. Oregon State Medical Society*, 343 U.S. 326 (1952) there was an action for injunction to prevent and restrain violations of the antitrust act. The District Court dismissed the complaint, and the United States appealed directly to the Supreme Court, which held that the findings of the District Judge were not clearly erroneous. This Court stated:

"While Congress has provided direct appeal to this Court, it also has provided where an action is tried by a court without a jury 'findings of fact shall not be set aside unless clearly erroneous, and due regard should be given to the opportunity of the trial court to judge the credibility of the witnesses.' * * * There is no case more appropriate for the adherence of this rule than one in which the complaining party creates a vast record of accumulated evidence, as to long-past transactions, motives, and purposes, the effect of which depends largely upon credibility of witnesses."

It went on to say that:

"The sole function of an action for injunction is to forestall future violations."

The District Court had the occasion to consider the good faith or permanence of a changed attitude of the defendants, and the Supreme Court said:

> "But we find not the slightest reason to doubt the genuineness, good faith, or permanence of the changed attitude and strategy of these defendant-appellees which took place in 1941."

The same thing is, of course, true here where the Court of Appeals affirmed that the union officials in good faith ended all discriminatory practices. Similar also to the instant case was the finding of this Court in the *Oregon State Medical Society* case as follows:

> "Striking the events prior to 1941 out of the Government's case except for purposes of illustration or background information, little of substance is left. The case derived its coloration and support almost entirely from the abandoned practices. It would prolong this opinion beyond useful length to review evidentiary detail peculiar to this case."

This Court then found as follows:

> "We conclude that the Government has not clearly proved its charges. Certainly the Court's findings are not clearly erroneous. 'A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.' * * * The Government's contentions have been plausibly and earnestly argued, but the record does not leave us with any 'definite and firm conviction that a mistake has been committed.'"

Further,

> "As was aptly stated by the New York Court of Appeals, although in a case of rather different substantive nature, 'face to face with living witnesses, the original trier of the facts holds a position of ad-

vantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth * * * how can we say the judge is wrong? We never saw the witnesses * * * To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.' "

And this Court concluded:

"Affirmance is, of course, without prejudice to future suit if practices in conduct of the Oregon's Physician's Service or the county services, whether or not involved in the present action shall threaten or constitute violation of the antitrust law."

As we have pointed out heretofore that is the only remedy needed in the instant suit, if any is ever needed.

WHY NOT AFFIRMATIVE RELIEF?

The District Court enjoined any continuation of discriminatory practices in the referral system. And on the question of membership, if there is any discrimination occurring, the decree is specifically reopenable, and as shown above under general equity powers the entire decree is open, and thus most of what the Court of Appeals complained, that the District Court did not retain jurisdiction over the case, is not relevant.

The Court of Appeals also complained that the District Court had refused to require Local 38 to make known to Negroes the end of pre-Act discrimination (App. 85). But this was made known as the District Court specifically had found (App. 40):

"There is other evidence in the record that the present union leadership has actively participated in programs designed to further integration of the craft unions, and to stimulate minority group interest in the electrical trade."

And since then everything possible has been done to so notify blacks. Local 38's officers are speaking in black high schools and often on television and working with employment relations men in the colleges and high schools, stressing the opportunities for blacks in the electrical industry; participating in the "Outreach Program" conducted by the Workers Defense League which is federally funded for the purpose of obtaining employment for blacks in the building trades, and the Forest City Training Program also federally funded to rehabilitate and make employable the hard core black unemployed, and in every way showing that discrimination has ended since the taking of office by these men in the summer of 1967. They have affirmatively provided for employment of blacks, membership by blacks, placed blacks in the apprentice classes, signed contracts with black contractors. In the referral system every black who has asked for employment has been referred, and this means everyone sent by the Workers Defense League, all other such organizations, by Community Relations Officers, friends, etc. There are now 73 blacks on their way to eligibility in Group I upon passage of an exam and after the passing of which, membership is attained in the union.

Prior to June 30, 1970 thirty-eight had become eligible to take the examination; only eleven took it—five passed and are members of the union.[5] In the apprentice-

[5] Twenty-four more blacks were eligible for the last examination given June 30, 1970. Only seven took the exam and all failed. The Joint (Union and NECA) Examining Committee therefore declared the examination invalid and announced to the 24 that the *identical* examination would be repeated and those eligible would have an additional 30 days to study for it and that a black member of Local 38 would be on the committee to grade this examination. It is hoped this will not only find if a different examination or different study requirements are needed, but will also motivate more of those eligible to take the examination.

ship system, there are thirty black apprentices, nine percent of the total number of apprentices. So over one hundred blacks are now working in the union's jurisdiction.

This has all been accomplished by the union itself, not only by its eliminating discrimination, but by its affirmatively working closely with all black groups in Cleveland. Local 38 has become outstandingly known in Cleveland for its compliance with the law.[6]

The Court of Appeals was wrong in thinking Local 38 had not notified the black community of the end of its pre-Act discrimination. It has even been criticized by many other unions for such widespread activity in soliciting blacks. In spite of the criticism Local 38 leadership has continued to do its best to completely integrate this local.

Then why not accept affirmative relief? Why fight it?— Because it is unjust!

Why should leaders who have done nothing wrong be required to operate the union under the supervision of the Department of Justice? Why should they have to make reports monthly or quarterly or at any time to the Department of Justice? Why should the referral system be changed when no discrimination has been shown by these officers? Why should there have to be a separate referral

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[6] Typical is the following quotation from a columnist in the Cleveland Press (Norman Mlachak February 21, 1970):

"PRACTICING BROTHERHOOD . . . Chester J. Gray—he's the regional boss of the Equal Opportunity Commission—had high praise this week for the local and national leadership of the International Brotherhood of Electrical Workers. Gray called the IBEW "one of the great unions in this country" and praised it for its "magnificent thrust" toward ending discrimination within its ranks.

Local leaders of the IBEW are J. Gilbert Steele, president and Richard Acton, business manager. Both have won reelection to their offices by high margins after their attempts to integrate the local's ranks."

system for blacks? Particularly for ones without any experience. Why should the membership rules be changed when there has been no discrimination? Why should the apprenticeship selection be changed when there has been no discrimination? It is as if the Court of Appeals were saying, "Local 38's leaders have done nothing wrong. Its leadership is in good faith, but they must be under the domination of the Department of Justice." It is the same as requiring a healthy corporation to go into receivership. It is saying, "Well, why NOT have an injunction against you? You are a building trades union, you discriminated at some time or other (as others have, including the Department of Justice), and henceforth you will report to your parole officer regardless of the fact that you have a perfect record; regardless of the fact that you are in good faith, regardless of the fact that you are doing a tremendous job; regardless of the fact that you are the leaders in Cleveland among building trade unions in integration; regardless of the fact that you have never discriminated; regardless of the fact that you never intend to discriminate."

In other words, it doesn't matter that the Local 38 leaders have obeyed the law and done everything possible to abide by the law—they are to be on parole anyway. If their actions require a broad, all-inclusive injunction, then why bother with trials? Just enjoin all unions.

Further, it is widely known in the negro and white communities in which Local 38 operates that it has done everything possible to comply with this Act, and much, much more; if it is to be punished, what price compliance with the law? There are many labor organizations and employers who have NOT done everything possible, or anything possible, to comply with this law and who have, in fact, flaunted the law, and have not been punished, at

least as yet. Yet this local is to be punished? This failure of equality in the administration of the law will do more to harm its administration than anything else could possibly do. When innocent men are convicted and guilty men are acquitted or not tried, the law is dishonored.

Why should Local 38 not be free to continue its integration by itself to prove to the Cleveland community, black and white, that this one union, at least, can accept this law, obey it as it should be obeyed and be an example to all unions that voluntary compliance is possible. And almost everyone agrees that voluntary compliance is best.

And if Local 38 discriminates in the future, then the decree of the District Court can be opened and the matter handled as it should be when discrimination occurs.

CONCLUSION.

By setting aside the decree of the District Court in this case and in ruling that specific affirmative relief is mandatory, the Court of Appeals rendered the "clearly erroneous" and "abuse of discretion" rules inapplicable to Title VII cases, without authority in law or equity and in direct conflict with the decision of another Court of Appeals on the same matter. This is of major importance and in conflict with decisions of this Court in analogous situations.

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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